

RECEIVED

AUG 15 2019

DEPT OF WATER RESOURCES
SOUTHERN REGION

PROTEST

1. Matter being protested: Transfer No. 83485.
2. Name of protestant: Hiawatha Canal Water Users' Association of Lateral or Laterals ("Hiawatha Canal").
3. Protestant's Representative for service (If different than protestant): Fritz X. Haemmerle of Haemmerle Law, P.L.L.C., P.O. Box 1800, Hailey, Idaho 83333.
4. Service mailing address: Haemmerle Law, P.L.L.C., P.O. Box 1800, Hailey, Idaho 83333.
5. Service telephone no: (208) 578-0520; Email Address: fxh@haemlaw.com
6. Basis of protest (including statement of facts and law upon which the protest is based): The amount of water that is sought for transfer, 1.4 cfs, is mitigation water which the Department required Eccles Flying Hat Ranch, LLCV ("Eccles") to keep in the Hiawatha Canal when Eccles transferred 7.0 cfs of water out of the Hiawatha Canal in the year 2000 under Transfer No. 68526. Attached as Exhibit 1 is a letter dated December 27, 2000, which I sent to Allen Merritt explaining the Canals's position of Eccles transfer in 2000. Attached as Exhibit 2 is a letter from Allen Merritt to Lee Petersen reiterating the fact that 1.4 cfs was left in the Hiawatha Canal for mitigation.

All the same principles and rules apply to this particular transfer. Allowing this transfer to proceed would violate Idaho Code Section 42-222 and the Local Public Interest under Idaho Code Section 42-202B. Allowing parties to transfer mitigation water, which they were required to leave in a Canal on a prior transfer, is not only illegal, it would set a terrible precedent. That precedent is that parties can have transfers approved with mitigation requirements and then years later come back to the Department to have the mitigation transferred for their own benefit.

7. What would resolve your protest? Deny the Protest.

I hereby, acknowledge that if I, or my designated representative, fails to appear at any regularly scheduled conference or hearing in the matter of which I have been notified at the address above, the department may issue a notice of proposed default against me in this matter for failure to appear. I also verify that I have served a copy of this protest upon the applicant.

Signed this 9th day of August, 2019.

Protestant

Protestant's Representative

FOR OFFICE USE ONLY:

Fees paid: \$25.00 Date: 8/15/2019
Receipt No.: S037491 By: bm

EXHIBIT 1



THE ROARK LAW FIRM^{LLP}
ATTORNEYS AND COUNSELORS AT LAW

409 NORTH MAIN STREET
HAILEY, IDAHO 83333
TEL: 208-788-2427 • FAX: 208-788-3918

R. Keith Roark
K. Ellen Baxter
Fritz X. Haemmerle
Jennifer L.K. Haemmerle
Douglas Nelson
James W. Phillips

FILE COPY

Via Certified Mail
Receipt No. 7000 0520 0014 5787 1272

TWIN FALLS OFFICE:
300 2nd Avenue East
P.O. Box 2956
Twin Falls, Idaho 83308-2956
Tel: 208-733-3945
Fax: 208-733-4477

December 27, 2000

Idaho Department of Water Resources, Southern Region
Attn: Allen Merrit
1341 Fillmore St., Suite 200
Twin Falls, ID 83301

Re: *Eccles Water Right Transfer – Response to Letter of December 8, 2000*

Dear Allen:

In your letter of December 8, 2000, you requested that the Hiawatha Canal ("Hiawatha"), respond to the issue of conveyance loss for the Spencer F. Eccles - Flying Hat Ranch ("Eccles") water rights recently proposed for transfer. Those water rights are as follows: 37-00481B, 37-00482F, 37-00481A, 37-00482E, 37-00703F, 37-00886K, 37-30000Q, 37-00483D, 37-00704E, 37-00917, 37-30001, and 37-30002. The purpose of this letter is to convey Hiawatha's response.

As I explained to you in my prior correspondence, the Idaho Department of Water Resources ("IDWR") does not assign a conveyance loss sufficient to deliver each water right independent of other water rights that exist in any given ditch system. Instead, IDWR uses a so-called pro rata method of determining conveyance loss. Under this measurement system, one conveyance loss is assigned to a ditch system. Each water right in that ditch system then shares a pro rata portion of that single conveyance loss. The share of each water right depends on many variables including the relative quantity of the water right, the distance each water right is from the point of diversion, and the soil type(s) for the particular ditch.

Since IDWR does not assign an independent conveyance loss to each individual water right, one of the issues in the SRBA was how the Department protected existing water rights in a ditch system in the case of a forfeiture, abandonment, or transfer. Dave Tuthill, testifying on behalf of IDWR, stated that IDWR protects existing water rights by making sure that if a water right is transferred, its pro rata share of the conveyance loss remains in the system. Based on Mr. Tuthill's testimony, Special Master Cushman found as follows:

IDWR employs a weighted pro rata method of determining conveyance loss in the case of a right that has been split, pro-rating the conveyance loss to the various split portions. In those rare cases where one or some of the split rights are

abandoned or forfeited, IDWR would consider the conveyance loss portion of the lost right as remaining in the ditch. **This is the same methodology used by IDWR in a transfer of a water right out of a ditch, i.e., the conveyance loss portion of the right may not be transferred out of the ditch.**

Order on the Motion of Cranney Bros.' to Alter or Amend the Special Master's Recommendation, Subcase No. 36-00039D at 4 (emphasis added).

Understanding how IDWR treats conveyance loss in a transfer, the next inquiry is how the quantity of conveyance loss for the water right(s) proposed for transfer is determined. Certainly, potentially affected parties do not have the burden to investigate a canal system in order to determine how much conveyance loss should remain in a canal. To the contrary, the duty is on IDWR to investigate any transfer. Idaho Code Section 42-222. This duty should include all aspects of the water right, including the conveyance loss that must remain in the Canal after the proposed transfer. Hiawatha respectfully requests that IDWR performs its statutory duty to investigate the Eccles water rights to insure that the pro rata share of conveyance loss associated with each individual water right remains in the Hiawatha Canal. Given that IDWR has a legal duty to perform an actual investigation of water rights claimed in the SRBA, I would suggest that IDWR is in the best position to determine the proper pro rata conveyance loss for each of the Eccles water rights.

If IDWR wishes the input of Hiawatha on the issue of conveyance loss, the only intelligent suggestion we have relates to how IDWR has historically treated the issue of conveyance loss in the Hiawatha Canal. For example, in 1996, IDWR considered the transfer of water right 37-0000B, a water right owned by Patricia Weaver. For your information, I enclose a December 13, 1996, letter written from IDWR to Ms. Weaver. In that case, Ms. Weaver proposed the transfer of 0.10 cfs for the irrigation of 1.5 acres. Apparently, IDWR approved the entire transfer of 0.10 cfs; however, it instructed the water master that no more than 2.5 inches (0.05 cfs) could be delivered at the actual place of use. IDWR determined that remaining one-half of the water right represented conveyance loss.

The remaining 2.5 inches shall remain in the Hiawatha Canal where it is presumed to sink into the underground. The water master will show on his records that for the 5 inches he delivers to the head of the canal. Mr. Willard will use 2.5 inches and 2.5 inches will be lost to canal seepage.

December 13, 1996, Letter by IDWR to Patricia Weaver; Water Right 37-0000B.

Based on the transfer of water right 37-0000B, it is apparent that IDWR "presumes" the conveyance loss in the Hiawatha Canal to be fifty (50) percent of each

Allen Merrit
December 27, 2000
Page 3

water right. Accordingly, on behalf of the Hiawatha Canal, I would request that you apply this same "presumption" to the Eccles water rights.

Thank you for allowing Hiawatha to have some input for the Eccles water rights transfers. If you have any other questions or inquires, please do not hesitate to call. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Fritz X. Haemmerle', with a stylized, cursive script.

Fritz X. Haemmerle

FXH

Enclosure

cc: Dave Cropper

Evan Robertson, Esq.

(Return receipt No. 7000 0520 0014 5787 1265)

CERTIFIED MAIL



THE ROAR LAW FIRM
409 NORTH MAIN STREET
HAILEY, IDAHO 83333

7000 0520 0014 5787 1272
7000 0520 0014 5787 1272

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

Daivatha Canal

Postage	\$.33
Certified Fee	1.40
Return Receipt Fee (Endorsement Required)	1.25
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 2.98

Postmark:
Here

Recipient's Name (Please Print Clearly) (To be completed by mailer)

Allen Merritt, IDWR
Street, Apt. No., or PO Box No.
1341 Stillmore St. Ste. 200
City, State, ZIP+4
Twin Falls ID 83301

PS Form 3800, February 2000

See Reverse for Instructions

CERTIFIED MAIL



**THE
ROARK
LAW FIRM**

409 NORTH MAIN STREET
HAILEY, IDAHO 83333



7000 0520 0014 5787 1265
7000 0520 0014 5787 1265

03-1906

**U.S. Postal Service
CERTIFIED MAIL RECEIPT**
(Domestic Mail Only; No Insurance Coverage Provided)

Hiawatha Canal

Postage	\$.33
Certified Fee	1.40
Return Receipt Fee (Endorsement Required)	1.25
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 2.98

Postmark
Here

Recipient's Name (Please Print Clearly) (To be completed by mailer)
Evan Robertson, Esq.

Street, Apt. No.; or PO Box No.
P.O. Box 1906

City, State, ZIP+4

Twin Falls

ID

83303-1906

PS Form 3800, February 2000

See Reverse for Instructions

EXHIBIT 2



State of Idaho

DEPARTMENT OF WATER RESOURCES

1341 Fillmore Street, Suite 200, Twin Falls ID 83301-3380

Phone: (208) 736-3033 FAX: (208) 736-3037

CC TO CLIENT

4/17/03 *lt*

SOUTHERN REGION

RECEIVED

APR 14 2003

HAEMMERLE & HAEMMERLE PLLC

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

April 11, 2003

Lee Peterson, Watermaster
PO Box P
Shoshone, ID 83352

RE: Delivery of Right 37-577BP

Dear Lee:

Our office has received a letter dated 4/8/2003 from the Hiawatha Canal's attorney (Fritz Haemmerle). Please find copy enclosed. The letter is self explanatory.

As you may recall Transfer 68526 changed right 37-577BP along with others owned by Eccles (Flying Hat Ranch) by changing the authorized points of diversion(s). Transfer 68526 was approved on 5/6/2002. One of the conditions of approval is that a portion of the right (1.4 cfs) is required to be left in the Hiawatha Canal to mitigate for the transfer of the right to other diversion(s).

As a side note: Our records indicate that a portion of this rights was transferred in 2002 under an emergency drought temporary transfer but this action should not have relieved the owner to maintain the mitigation water to the Hiawatha Canal.

If you have not already made your delivery of the subject right consistent with the approval of transfer 68526 please do so. If you need a copy of the transfer please let us know. If you have questions about this please feel free to contact our office.

Sincerely,

Allen Merritt, PE
Southern Region Manager

CC: Fritz Haemmerle
Tim Luke

HAEMMERLE LAW, P.L.L.C

Attorney & Counselor at Law

Fritz X. Haemmerle
fxh@haemlaw.com

P.O. Box 1800
Hailey, ID 83333

400 South Main Street, Suite 102
Tel: (208) 578-0520
Fax: (208) 578-0564

RECEIVED

AUG 15 2019

DEPT OF WATER RESOURCES
SOUTHERN REGION

August 12, 2019

IDWR Southern Region
650 Addison Ave. W, Suite 500
Twin Falls, ID 83301-5858

Re: **Protest**: Transfer No. 83485

Protestant: Hiawatha Canal Water Users' Association of Lateral or Laterals
("Hiawatha Canal").

To Whom It May Concern:

This firm represents the Hiawatha Canal Water Users' Association of Lateral or Laterals ("Hiawatha Canal"). Please find enclosed the Hiawatha Canal's Protest for Transfer No. 83485. I have also enclosed the \$25.00 fee. If there is anything else you require, please advise.

Thank you.

Sincerely,

HAEMMERLE LAW, P.L.L.C.



Fritz X. Haemmerle

FXH: fxh
cc: client

Eccles Flying Hat Ranch LLC
P.O. Box 3028
Salt Lake City, UT 84110-3028
Certified Mail: 7018 1130 0000 2187 0311